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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, *ex rel.* EDMUND G. BROWN JR., ATTORNEY GENERAL

Plaintiff,

v.

GENERAL MOTORS CORPORATION, a Delaware Corporation, TOYOTA MOTOR NORTH AMERICA, INC., a California Corporation, FORD MOTOR COMPANY, a Delaware Corporation, HONDA NORTH AMERICA, INC., a California Corporation, CHRYSLER MOTORS CORPORATION, a Delaware Corporation, NISSAN NORTH AMERICA, INC., a California Corporation

Defendants.

Case No.3:06-cv-05755 MJJ

CALIFORNIA'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Date: March 6, 2007
Time: 9:30 a.m.
Judge: Hon. Martin J. Jenkins

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INTRODUCTION

The People of the State of California, *ex rel.* Edmund G. Brown Jr., Attorney General ("California"), seek recovery of damages resulting from, and related to, global warming in California caused in significant part by defendants' greenhouse gas emissions. As California has alleged in its complaint, the transportation sector accounts for approximately thirty percent of all carbon dioxide emissions in the United States, and the six defendants in this case account for the vast majority of those emissions. Global warming, right now, is costing California tens of millions of dollars to address significant harm to its infrastructure and natural resources, including flood control system degradation, coastal erosion, snow pack depletion, species impacts, and harm to public health.

Defendants contend that this case requires the Court to create a new federal common law claim of interstate environmental public nuisance that would raise judicially unmanageable "political questions." But defendants' contention ignores a century of precedent beginning with *Georgia v. Tennessee Copper Company*, 206 U.S. 230, 231 (1907) in which federal courts have routinely recognized and adjudicated interstate nuisance claims, applying traditional legal tools to reach principled, rational rulings.

The Supreme Court has determined that a federal common law claim of nuisance to redress claims related to harmful air emissions exists and can be adjudicated. Thus, the question here is whether an intervening federal statute has displaced the common law. No federal statute speaks directly to the particular problem of global warming, to greenhouse gas emissions, or to a state's remedies. In the absence of such comprehensive federal legislation, federal common law applies, and California has a right to proceed.

STANDARD OF REVIEW

Lack Of Subject Matter Jurisdiction

Federal Rules of Civil Procedure, Rule 12(b)(1) governs defendants' contentions that this case presents a nonjusticiable political question and that the federal common law of nuisance has been displaced. A Rule 12(b)(1) motion may be either "facial, confining the inquiry to the allegations in the complaint, or factual, permitting the court to look beyond the complaint."

Wolfe v. Strankman, 392 F.3d 358, 362 (9th Cir. 2004). If a court elects to resolve a fact-based Rule 12(b)(1) motion without an evidentiary hearing, it must accept the factual allegations of the complaint as true. *McLachlan v. Bell*, 261 F.3d 908, 909 (9th Cir. 2001).

In this case, the jurisdictional questions presented are legal matters that the Court must answer by examining the governing case law and statutes. Accordingly, the Court need not resolve any disputed factual issues to determine whether it possesses subject matter jurisdiction.

Failure To State A Claim

Motions to dismiss for failure to state a claim under Federal Rules of Civil Procedure, Rule 12(b)(6) are viewed with disfavor, and, accordingly, dismissals for failure to state a claim are "rarely granted." *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997) (citation omitted). In deciding a motion to dismiss, the court must accept as true the allegations of the complaint and draw reasonable inferences in the plaintiff's favor. *Doe v. United States*, 419 F.3d 1058, 1062 (9th Cir. 2005). Inquiry into the adequacy of the evidence is improper. *Enesco Corp. v. Price/Costco, Inc.*, 146 F.3d 1083, 1085 (9th Cir. 1998). A court may not dismiss a complaint "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

FACTS

The following facts, as set forth in California's complaint, establish California's nuisance claim and this Court's subject matter jurisdiction.

Defendants' Products Emit Greenhouse Gases

The six defendant automakers produce vehicles that emit over 289 million metric tons of carbon dioxide, the primary global warming or greenhouse gas, in the United States. (Second Amended Complaint for Damages ("Compl.") 9, ¶ 40.) These emissions constitute over twenty percent of human-generated carbon dioxide emissions in the United States. (*Id.*) Defendants' carbon dioxide emissions account for over thirty percent of such emissions in California. (*Id.*)

Greenhouse Gases Cause Global Warming

Human-induced emissions of carbon dioxide, such as those from motor vehicles, are causing global warming. (Compl. at 5, ¶ 19.) There is a scientific consensus that global

warming has begun, and that emissions from fossil fuel combustion, primarily carbon dioxide, cause most of the global warming. (*Id.*, ¶ 23.) The Intergovernmental Panel on Climate Change, a collaborative scientific effort among the nations of the world, concluded in its 2001 report that "most of the observed warming over the last 50 years is likely to have been due to the increase in greenhouse gas concentrations." (*Id.* at 5-6, ¶ 24.) In 2005, the National Academies of Science for Brazil, Canada, China, France, Germany, India, Italy, Japan, Russia, the United Kingdom, and the United States jointly concluded that "there is now strong evidence that significant global warming is occurring." (*Id.* at 6, ¶ 25.)

Carbon dioxide is the most significant greenhouse gas emitted by human activity. (*Compl.* at 6, ¶ 27.) Energy from the sun heats the Earth, which re-radiates the energy into the Earth's atmosphere. Carbon dioxide traps heat in the Earth's atmosphere that would otherwise escape into space. (*Id.*, ¶ 28.) Carbon dioxide levels have increased thirty-five percent since the beginning of the industrial revolution in the 1880s, with more than one-third of that increase occurring since 1980. (*Id.* at 7, ¶ 30.) Currently, the level of carbon dioxide in the atmosphere is higher than it has been at any time in the last 650,000 years. (*Id.*) The global average surface temperature of the Earth increased about 1.26 degrees Fahrenheit between the late 1800s and 2000, with over one degree of that warming occurring in the last three decades. (*Id.*, ¶ 32.) The hottest years on record, since temperature records began in 1861, are, in order, 2005, 1998, 2002 (tied), and 2003 (tied). (*Id.*, ¶ 33.) Scientists have determined that there is a causal connection between emissions of greenhouse gases and rising temperatures. (*Id.* at 8, ¶ 35.)

Global Warming Is Real And Causes Substantial Harm

Global warming causes sea levels to rise through thermal expansion of ocean water and melting of land-based snow and ice. Satellite measurements of the oceans have detected an acceleration of sea level rise consistent with the fundamental physics of a warming world. (Compl. at 8, ¶ 36.) Other clear indicators of global warming include rapid and severe climate change in the Arctic (such as the thawing of permafrost, later freezing and earlier breakup of ice on rivers and lakes, and the retreat of mountain glaciers); melting and breakup of ice sheets on Greenland and Antarctica; the retreat of mountain glaciers worldwide; increased ocean

temperatures worldwide; bleaching of coral reefs from increased ocean temperatures; and changes in plant and animal ranges towards higher latitudes and altitudes all over the world. (*Id.* at 8-9, ¶¶ 37, 38, 39.)

Global Warming Is Causing, And Will Continue To Cause, Harm To California

California has spent millions of dollars to study, plan for, monitor, and respond to impacts already caused by global warming and impacts likely or certain to occur. (Compl. at 10, ¶ 44.) In California, the winter average temperature in the Sierra Nevada region has risen by almost four degrees Fahrenheit during the second half of the twentieth century. As a result, snow pack in the Sierra has been reduced. (*Id.* at 10, ¶ 47.) The Sierra snow pack serves as a vital water storage and supply system for California, supplying approximately thirty-five percent of the State's water. The State is spending substantial money studying, planning and responding to these impacts. (*Id.* at 10, ¶ 48.)

As a result of increased temperatures, the Sierra snow pack now melts earlier in the spring, resulting in increased risk of flooding. For example, Folsom Dam on the American River was designed in 1950 based on historic flow records to protect against a 500-year flood. Now, because of the increased snow melt, there have been five floods on the American River larger than the pre-1950 recorded maximum flood, and the dam can now protect against only a fifty-year flood. (*Id.* at 11, ¶ 51.)

Rising sea levels are increasing erosion along California's approximately 1,075 miles of coastline. The State has expended millions of dollars responding to erosion at State beaches and the impacts of storm surges, and has suffered damages from beach closures and natural resource degradation. (*Compl.* at 11, ¶ 52.) The State is also addressing the threat, resulting from sea level rise, of salt infiltration to the fresh water of the San Francisco Bay-Delta, by, for example, reenforcing and increasing the height of levees. (*Id.* at 11-12, ¶ 54.)

Global warming is also having severe impacts on the health and well-being of California's residents and the State's health system, through the increase in the frequency, duration, and intensity of extreme heat events. (Compl. at 12, ¶ 55.) Other impacts of global warming include increased risk and intensity of wildfires, loss of moisture due to earlier snow pack melt, and

change in the ocean ecology. All of these impacts are the subject of State study and planning, and have cost California millions of dollars. (*Id.* at 12, ¶ 56.)

ARGUMENT

I. CALIFORNIA'S NUISANCE CLAIM PRESENTS A COGNIZABLE AND JUSTICIABLE FEDERAL QUESTION

Defendants advance three primary arguments in support of their motion to dismiss California's federal claim for common law nuisance. Defendants argue that (1) there is no applicable federal common law, and the Court should not create a common law federal cause of action for public nuisance in the form of global warming; (2) any applicable federal common law has been displaced by the Energy Policy and Conservation Act ("EPCA"), 42 U.S.C. § 6201, *et seq.*, and the Clean Air Act, 42 U.S.C. § 7401, *et seq.*; and (3) even assuming there is a federal common law nuisance claim, it would raise nonjusticiable "political questions" that federal courts cannot address.

As set forth below, the Supreme Court has long recognized a federal cause of action for the type of interstate, environmental public nuisance California alleges. Congress has not enacted anything that approaches the kind of comprehensive statute speaking directly to the particular problem of global warming that would be required to displace the federal common law. The extensive history of federal common law public nuisance underscores that adjudicating interstate public nuisance claims, even those that are complex, falls squarely within the competence of federal courts. And nothing in this case interferes with political decisions or policies existing under any law, treaty, or agreement. For these reasons, the Court should deny defendants' motion and allow California's claim to proceed.

A. More Than A Century Of Federal Precedent Recognizes Federal Common Law Claims For Interstate Public Nuisances

According to the defendants, "there is no federal cause of action to sue for global warming," requiring this Court to create one "out of whole cloth." (Defendants' Notice of Motion and Motion to Dismiss, Memorandum of Points and Authorities ("Def. Mem.") at 12, 15.) In fact, the Supreme Court has long recognized a federal cause of action for nuisances that cross state lines. *See, e.g., Missouri v. Illinois*, 180 U.S. 208, 241 (1901) (water pollution);

Tennessee Copper, 206 U.S. at 231 (air pollution). One hundred years ago the State of Georgia sued various companies to enjoin them "from discharging noxious gas from their works in Tennessee over [Georgia's] territory." *Tennessee Copper*, 206 U.S. at 231. Justice Holmes, writing for the Court, determined that a federal court was the proper forum for Georgia's claim:

> When the states by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining *quasi*-sovereign interests; and the alternative to force is a suit in this court.

Id. at 237. Indeed, federal courts have a "duty of providing a remedy" in interstate nuisance suits. *Missouri v. Illinois*, 180 U.S. at 241. As the Supreme Court more recently reaffirmed, "[w]hen we deal with air and water in their ambient or interstate aspects, there is federal common law." *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972) ("*Milwaukee I*"); *see also Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 487-488 (1987).

The federal common law of public nuisance encompasses a multitude of environmental and resource-related wrongs committed against a state and its citizens. *See, e.g. Milwaukee I*, 406 U.S. at 103 (water pollution); *New Jersey v. City of New York*, 283 U.S. 473 (1931) (ocean dumping); *New York v. New Jersey*, 256 U.S. 296 (1921) (water pollution); *North Dakota v. Minnesota*, 263 U.S. 365 (1923) (flooding); *Tennessee Copper*, 206 U.S. at 238-239 (air pollution); *Missouri v. Illinois*, 200 U.S. 496 (1906) (water pollution); *Missouri v. Illinois*, 180 U.S. at 241 (water pollution); *Wisconsin v. City of Duluth*, 96 U.S. 379 (1877) (drying of a river); *Pennsylvania v. The Wheeling & Belmont Bridge Co.*, 54 U.S. 518 (1851) (interference with river navigation); *Mayor, etc. of City of Georgetown v. Alexandria Canal Co.*, 37 U.S. 91, 97 (1838) (river siltation).

Defendants correctly note that federal common law exists only in "few and restricted" instances (Defs. Mem. at 13), citing non-environmental cases such as *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981). But since one of those instances in which common law exists is interstate nuisance, defendants' citations do not advance their argument. Indeed, in *Texas Industries*, the Court acknowledged that interstate water pollution disputes "involve especial federal concerns to which federal common law applies." 451 U.S. at 641 n.13.

Defendants also cite *National Audubon Society v. Dep't of Water*, 869 F.2d 1196 (9th Cir. 1988), in which the Ninth Circuit declined to apply federal common law to the plaintiff's claim that lake bed dust created a public nuisance. In *Audubon*, however, the court held that federal common law did not apply only because the air pollution was from a source "wholly within the State of California." *Id.* at 1198. In contrast, in this case, the emissions from defendants' automobiles cross state lines. (Compl. at 13, ¶ 60.)

In sum, this Court does not need to create a new "cause of action to sue for global warming," as defendants claim. Federal common law already exists to remedy the type of interstate pollution that California has alleged in the complaint.[1/]

B. Congressional Action Has Not Displaced California's Claim That Defendants' Contributions To Global Warming Are A Public Nuisance Under Federal Law

The Supreme Court has established that federal common law applies to a cause of action for interstate air pollution. Accordingly, the question presented to this Court is whether Congress has displaced the common law by subsequent statute. Displacement is not "automatic" simply because Congress has enacted a statute that arguably touches on the issue encompassed by the federal common law. *Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 315 n.8 (1981) ("*Milwaukee II*"). "[S]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *United States v. Texas*, 507 U.S. 529, 534 (1993) (quotation omitted) (alteration in original). Because no comprehensive federal statute directly addresses greenhouse gas emissions or global warming, California's federal common law claim

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1. In a footnote, defendants concede that the Supreme Court has recognized a federal common law nuisance action for interstate pollution, but then argue that it is limited to nuisances of a "simple type." (Def. Mem. at 14 n.6 (citing *Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 315 n.8 (1981) ("*Milwaukee II*")). Defendants imply that federal courts cannot decide complex nuisance claims. (*See* Def. Mem. at p. 14 n.6.) The language of *Milwaukee II* cannot be stretched so far. There is absolutely no authority that distinguishes between "simple" and "complex" nuisances, or holds that federal common law applies only to the former. Read reasonably, "simple" as used by the Court means merely that nuisance based on pollution is a type of claim that is ordinary and common in the law.

is not displaced.[2/]

1. To Displace Federal Common Law, Congress Must Pass A Comprehensive Statute That Speaks Directly To The Particular Question Formerly Governed By Federal Common Law

To displace the federal common law, Congress must enact a "comprehensive" statutory solution that "speaks directly" to the "particular issue" otherwise governed by the common law. *County of Oneida, New York v. Oneida Indian Nation of New York State*, 470 U.S. 226, 236-237 (1985) (summarizing *Milwaukee II*, 451 U.S. at 313-315). The starting point for determining the substance of this test is the Supreme Court's pair of decisions in *Milwaukee I* and *Milwaukee II*.

In *Milwaukee I* (1972), Illinois brought suit in federal court for abatement of discharges of sewage into Lake Michigan from out-of-state sources. *Milwaukee I*, 406 U.S. at 93. The Court, based on the longstanding case law, recognized a federal common law cause of action for nuisance claims involving "air and water in their ambient or interstate aspects[.]" *Id.* at 103. "Until the field has been made the subject of comprehensive legislation or authorized administrative standards, only a federal common law basis can provide an adequate means for dealing with such claims as alleged federal rights." *Id.* at 107 n.9 (quotation omitted). While by 1972, Congress had enacted environmental protection statues such as the Clean Water Act, the Court held that no federal statute then in effect was sufficient to displace the federal common law of nuisance as applied to interstate water pollution, and, therefore, Illinois could proceed with its claim. *Id.* at 102-103, 106-107.

Nine years later, in *Milwaukee II* (1981), the Supreme Court considered the issue a second time. In the intervening years, Congress had engaged in a "total restructuring" and "complete rewriting" of the Clean Water Act through its 1972 Amendments. *Milwaukee II*, 451 U.S. at 317. In the Court's words, the amendments established an "all-encompassing program of water

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2. Even though courts on occasion have used the term "preemption" to describe it, the test for displacement of federal common law by federal statute (a separation of powers analysis) is not the same as the test for federal preemption of state laws (a Supremacy Clause analysis). *Milwaukee II*, 451 U.S. at 316.

pollution regulation." *Id.* at 318. Finding no basis "to impose more stringent limitations than those imposed under the regulatory regime[,]" the Court held that Congress had displaced the plaintiffs' common law nuisance claim for interstate water pollution. *Id.* at 317, 320.

The Court in *Milwaukee II* began with the "assumption that it is for Congress, not federal courts, to articulate the appropriate standards to be applied in a matter of federal law." *Milwaukee II*, 451 U.S. at 316 (quotation omitted). But, as Justice Blackmun noted, "the fact that Congress can properly check the courts' exercise of federal common law does not mean that it has done so in a specific case. . . . To say that Congress 'has spoken' . . . is only to begin the inquiry; the critical question is what Congress has said." *Id.* at 339 n.8 (Blackmun, J., dissenting).

The fact that a statute covers the same general subject matter as a federal nuisance action is not sufficient to displace federal common law. In *Milwaukee I*, the Court noted that Congress had passed numerous laws "touching" interstate waters, such as the Clean Water Act and, in addition, the Rivers and Harbors Act, the National Environmental Policy Act, the Fish and Wildlife Act, and the Fish and Wildlife Coordination Act, without displacing federal common law. *Milwaukee I*, 406 U.S. at 101-102. Instead, Congress must "establish a *comprehensive* long-range policy for the elimination of" the particular problem at issue. *Milwaukee II*, 451 U.S. at 318 (quotation omitted, emphasis in original). In *Milwaukee II*, the Court found that the intent of the 1972 Clean Water Act Amendments "was clearly to establish an all-encompassing program of water pollution regulation." *Id.* (quotation omitted).

A significant indication that Congress has displaced federal common law through comprehensive legislation is the presence of an all-encompassing permitting scheme. The Court in *Milwaukee II* noted that after the 1972 Amendments, "*[e]very* point source discharge is prohibited unless covered by a permit, which directly subjects the discharger to the administrative apparatus established by Congress to achieve its goals." *Milwaukee II*, 451 U.S. at 318 (quotation omitted, emphasis in original); *see also Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 11-12 (1981) (holding that Clean Water Act and Marine Protection, Research, and Sanctuaries Act, both of which require permits for discharges,

displaced federal common law nuisance for discharges to ocean).

In addition to being comprehensive, a displacing federal statute must speak directly to the particular question otherwise answered by federal common law. *Oneida*, 470 U.S. at 236-237; *Milwaukee II*, 451 U.S. at 313-315. In *Milwaukee II*, the Court held that Congress in the amended Clean Water Act had spoken directly to the subject matter of effluent and sewerage overflows at issue because defendants' permits contained "specific effluent limitations"; "explicitly address[ed] the problem of overflows"; and contained requirements for defendants to come into compliance. *Id.* at 320-321. The Court thus concluded, after the 1972 Amendments to the Clean Water Act, "[t]here is no 'interstice' here to be filled by federal common law[.]" *Id.* at 323.

To speak "directly to the question" and displace federal common law, a federal statute must provide some recourse for the problem at issue in the federal common law claim. In *Milwaukee II*, the Court found it relevant that the amended Clean Water Act allowed Illinois to participate in the permit issuing process, so it was not left without a federal forum in which to protect its interests in clean water. *Milwaukee II*, 451 U.S. 325; *see also Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 490-491, 498 n.18 (1987) (noting that state can apply to federal agency to disapprove Clean Water Act permit based on undue impact and can bring a citizen suit action to enforce permit after issuance); *cf.*, *Oneida*, 470 U.S. at 237 (holding that Nonintercourse Act did "not speak directly to the question of remedies for unlawful conveyances of Indian land"; federal common law claim for unlawful possession and damages not displaced); *United States v. Texas*, 507 U.S. at 534-535 (holding that Debt Collection Act did "not speak directly" to the federal government's right to collect pre-judgment interest on debts owed to it by a state; federal common law claim not displaced).

As *Milwaukee I* and *Milwaukee II* demonstrate, while Congress has the authority to displace California's federal common law claim that interstate pollution from automobile emissions contributes to a public nuisance, it can do so only through all-encompassing, comprehensive legislation that speaks directly to greenhouse gas emissions and global warming. Because there is no such legislation, there is no displacement of California's claim.

2. Neither The Clean Air Act Nor The Energy Policy and Conservation Act Displaces California's Common Law Action Seeking Damages For The Nuisance Of Global Warming

Defendants contend that California's federal common law claim has been displaced. (Def. Mem. at 15-19.) The federal government, however, has established no restrictions of any kind on emissions of carbon dioxide or other greenhouse gases in any form under any statute or administrative standard, and has no affirmative plan to address global warming. In fact, the agency that one reasonably would expect to have taken the lead on control of greenhouse gas emissions, the United States Environmental Protection Agency ("U.S. EPA"), states that it is precluded from regulating greenhouse gas emissions under the Clean Air Act. *See* Control of Emissions From New Highway Vehicles and Engines ("Control of Emissions"), 68 Fed. Reg. 52,922-59,933 (Sept. 8, 2003).

Defendants attempt to cobble together a "comprehensive program" from passing references to the Clean Air Act and EPCA. (Def. Mem. at 15-19.) This Court must, however, apply the test set forth in *Milwaukee II* to determine whether either of these Acts constitutes the type of comprehensive statute that speaks directly to the particular issue at the heart of California's nuisance claim. On examination, neither statute serves to displace California's claim.

a. The Clean Air Act Is Not Comprehensive, And U.S. EPA Has Stated That It Cannot Address The Issue Of Global Warming

In their displacement argument, defendants mention the Clean Air Act only in passing and, in a footnote, refer the Court to a Clean Air Act provision that preempts certain state law. (Def. Mem. at 16 n.7.) But defendants say absolutely nothing about any effect on federal common law. (*See id.*) The Clean Air Act does not displace California's federal common law nuisance claim for two important reasons.

First, U.S. EPA, the agency charged with implementing the Clean Air Act, has taken the position that it cannot regulate carbon dioxide emissions. "In a memorandum to the Acting Administrator dated August 29, 2003, the General Counsel concluded that the Clean Air Act does not authorize U.S. EPA to regulate for global climate change purposes, and accordingly that carbon dioxide and other GHGs cannot be considered 'air pollutants' subject to the Clean Air

Act's regulatory provisions for any contribution they may make to global climate change." Control of Emissions, 68 Fed. Reg. at 52,925.[3/] U.S. EPA's interpretation precludes a finding of displacement.

Second, even without U.S. EPA's interpretation, the Clean Air Act is not a "comprehensive" statute that addresses all sources of air pollution. The Clean Air Act thus differs significantly from the post-1972 amended Clean Water Act, which the Supreme Court in *Milwaukee II* found sufficiently "comprehensive" to displace water pollution nuisance claims. In brief, unlike the amended Clean Water Act, the Clean Air Act does not regulate emissions from every source and does not contain a comprehensive permitting program. *See Audubon*, 869 F.2d at 1212-1213 (Reinhardt, J., dissenting from majority's holding, reaching displacement issue, and reasoning that Clean Air Act does not displace federal common law nuisance claims based on air pollution); *accord New England Legal Found. v. Costle*, 666 F.2d 30, 32 n.2 (2d Cir. 1981). The Clean Air Act, like the pre-amendment Clean Water Act, relies on national standards that are implemented through state plans, rather than the source-specific permit system of the amended Clean Water Act. *Id.* Even in the Clean Air Act's mobile source provisions, "the Act does not use a comprehensive permit system like the one that applies to water pollution." *Id.* at 1213 n.14 (citing 42 U.S.C. §§ 7411, 7521 (1982)).[4/]

For these reasons, the Clean Air Act – the federal statute that would be the most natural source for a comprehensive scheme displacing federal common law claims based on air pollution – does not displace California's claim.

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3. California has joined other states challenging U.S. EPA's interpretation of the Clean Air Act in *Massachusetts v. EPA*, No. 05-1120 (U.S. Supreme Court, 2006).

4. Two out-of-circuit district court cases that have found that the Clean Air Act displaces federal common law claims for nuisance have done so largely without analysis. In *United States v. Kin-Buc, Inc.*, 532 F. Supp. 699, 702 (D.N.J. 1982), the court with virtually no analysis simply states that federal common law is displaced. *Reeger v. Mill Service, Inc.*, 593 F. Supp. 360, 363 (W.D. Pa. 1984), is similarly devoid of any substantial statutory analysis. These cases are not consistent with *Milwaukee I* and *Milwaukee II*, which establish that there is no automatic displacement of federal common law.

b. The Energy Policy And Conservation Act Is An Energy Conservation Statute, Does Not Address Greenhouse Gas Emissions Or Global Warming, And Provides No Relevant Remedy

Because the Clean Air Act falls short as support for defendants' displacement argument, defendants cite EPCA as the centerpiece of what they describe as the federal government's "detailed, multifaceted approach to address the issue of global warming." (Def. Mem. at 15.) But by no stretch is EPCA a comprehensive statute that speaks directly to the particular issue behind California's public nuisance claim – damages caused by interstate greenhouse gas pollution.

Congress did not intend EPCA to be a comprehensive environmental or global warming statute. The purpose of EPCA, enacted in 1975 in the wake of the Arab oil embargo, is to address "serious long-term economic and national security problems that continuing dependence on foreign sources of energy would create." *Natural Res. Def. Council, Inc. v. Herrington,* 768 F.2d 1355, 1364 (D.C. Cir. 1985); *see also* 42 U.S.C. § 6201 (setting forth purposes). Congress' intent in passing EPCA was to increase the domestic supply of petroleum, conserve energy, and decrease the nation's vulnerability to interruptions in petroleum imports. *See* H.R. Rep. No. 94-340, at 1 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1762, 1763. Moreover, EPCA does not in any way regulate or "permit" the emissions of carbon dioxide or greenhouse gases. Instead, EPCA, through the Department of Transportation, establishes fleet-wide average fuel economy standards for new vehicles, commonly called CAFE ("corporate average fuel economy") standards. 49 U.S.C. § 39904(a)(1)(B).

Defendants contend that because EPCA preempts states from setting fuel economy standards (*see* 49 U.S.C. § 32919), and because fuel economy standards and carbon dioxide emission standards are, in defendants' view, "functionally equivalent" (Def. Mem. at 17), EPCA displaces California's federal common law public nuisance action. There are two primary defects in this argument. First, California brings its nuisance claim under federal, not state law. Therefore, a provision that preempts state law is not relevant to the question of whether a federal common law nuisance claim has been displaced. *See Milwaukee II*, 451 U.S. at 316.

Second, and more fundamentally, defendants' argument is relevant to the displacement

analysis only if fuel economy standards are so inextricable from the control of greenhouse gases that a statute directly addressing fuel economy standards necessarily also directly and comprehensively addresses global warming. The fallacy in this argument is apparent in the answer to the question: Is increasing mileage standards in gas-burning passenger vehicles – which is the approach Congress adopted in EPCA to improve fuel conservation – the only way to address global warming? The answer to this question clearly is "no." If Congress were to pass a statute intended comprehensively to address global warming, it could, for example, require the use of alternative fuels, the development and use of new technologies to capture or sequester emissions, and the reduction of emissions upstream in the manufacturing process, and utilize various other strategies to reduce greenhouse gas emissions. Therefore, applying the displacement test of *Milwaukee II*, while EPCA's conservation of petroleum-based fuels may have indirect benefits in the fight against global warming, EPCA does not speak directly to the particular environmental problem of global warming. [5/]

Moreover, there is no provision in EPCA that affords any kind of remedy related in any way to global warming. *See Oneida*, 470 U.S. at 238 (stating rule that to displace federal common law, Congress must regulate the conduct at issue and provide a remedy). While defendants cite an enforcement provision in EPCA imposing civil penalties for failure to meet CAFE standards, (Defs. Mem. at 16 (citing 49 U.S.C. § 32912)), there is no cause of action under EPCA that California or any other person or entity could bring to address harm caused to natural resources as the result of emissions of greenhouse gases, and certainly nothing under EPCA that provides for damages. The remedy California seeks is not within the precise scope of remedies prescribed by Congress in EPCA, which is further evidence that California's claim is not displaced by EPCA. *See Milwaukee I*, 406 U.S. at 103; *Oneida*, 470 U.S. at 238.

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5. California objects to defendants' citations to the views of federal agencies, as set forth in the Federal Register, in support of their "functional equivalency" argument. (*See* California's Objection to Def. Req. for Judicial Notice.) At a minimum, defendants' argument raises a disputed factual issue that cannot be addressed in a motion to dismiss.

3. Since There is No Existing Federal Detailed, Multifaceted Statutory Approach To Address The Issue Of Global Warming, Federal Common Law Continues To Exist To Address This Interstate Nuisance

Defendants present no comprehensive statute or scheme, and fail to deliver the promised detailed, multifaceted approach addressing the issue of global warming. Neither the Clean Air Act nor EPCA provides any limits of any kind on any greenhouse gas emissions, creates any permitting process, purports to address greenhouse gases or global warming in any direct manner, or provides any remedy for harms of any kind caused by global warming. Because these circumstances do not meet the *Milwaukee II* requirements for displacement, California's federal claim is not displaced.

C. California's Federal Common Law Nuisance Claim Presents A Justiciable Controversy That, Although Complex, Is The Kind Of Case That Courts Routinely Resolve

Defendants contend that California's federal common law nuisance claim requires this Court to make policy determinations; would interfere with foreign affairs; and lacks judicially discoverable and manageable standards. (Def. Mem. at 5-12.) All of these arguments are challenges to the justiciability of California's federal claim under the "political question" doctrine of *Baker v. Carr*, 369 U.S. 186 (1962).[6/]

The fact that global warming has political and international aspects does not convert the issues presented in this tort damages case into nonjusticiable political questions. California's federal common law claim for public nuisance fits within a long line of interstate nuisance cases brought by states in federal court and is well within this Court's ability to adjudicate. Nothing in this case will interfere with the limited actions related to global warming taken by the political

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6. Defendants argue that this case would interfere with foreign affairs under a separate heading, citing cases where state laws were challenged, thereby suggesting that the analysis is different from the political question justiciability analysis. In fact, where the claim at issue is a federal law-based claim, rather than a state law-based claim, the analysis of interference with foreign policy or foreign commerce properly focuses on the appropriate separation of powers between the federal branches applying the *Baker* factors. *Alperin v. Vatican Bank*, 410 F.3d 532, 549-550 (9th Cir. 2005) (addressing the "foreign affairs" argument under the first *Baker* prong); *see also Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 229 (1986) (applying *Baker* factors to determine that claim against the Secretary of Commerce related to the enforcement of international whaling quotas was justiciable).

branches, or prevent those branches from taking action in the future.[7/]

1. Legal Standard: The Rule Of *Baker v. Carr* Governs Justiciability

Because of the judiciary's important role in the tripartite federal system, the Supreme Court and the Ninth Circuit have roundly rejected a broad or simplistic application of the political question doctrine. In *Baker*, the Supreme Court warned that it is "error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker*, 369 U.S. at 211. Similarly, the Ninth Circuit has emphasized that "[s]imply because . . . the case arises out of a 'politically charged' context does not transform the [claims] into political questions." *Alperin v. Vatican Bank*, 410 F.3d 532, 548 (9th Cir. 2005), *cert. denied*, *Order of Friars Minor v. Alperin*, __ U.S. __, 126 S.Ct. 1141 (2006). "The justiciability inquiry is limited to 'political questions,' not . . . 'political cases,' and should be made on a 'case-by-case' basis." *Alperin*, 410 F.3d at 537 (quoting *Baker*, 369 U.S. at 211, citations omitted).

In making its case-by-case determination of justiciability, a court must consider the six formulations set forth in *Baker*. *Alperin*, 410 F.3d at 544. As summarized in *Alperin*, these formulations are as follows:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. The formulations are "'probably listed in descending order of both importance and certainty.'" *Alperin*, 410 F.3d at 545 (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality opinion)). "Dismissal on the basis of the political question doctrine is appropriate only

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7. As defendants note, in the *American Electric Power Company* case, the district court dismissed the plaintiff states' common law nuisance claim against power companies finding that the claim for injunctive relief raised nonjusticiable political questions. *Connecticut v. Am. Elec. Power Co., Inc.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005). Appeal of the district court decision is pending before the Second Circuit. As California has argued to the Second Circuit, the district court erred by failing to follow controlling precedent, including *Baker v. Carr*. This case, unlike *American Electric Power Company*, seeks only damages.

if one of these formulations is 'inextricable' from the case." *Alperin*, 410 F.3d at 544 (citing *Baker*, 369 U.S. at 217).

Since none of the *Baker* factors is inextricable from California's federal common law claim, the Court should reject defendants' argument that this case is nonjusticiable.[8/]

2. None Of The *Baker v. Carr* Factors Is Inextricable From California's Claim

a. The Constitution Has Not Committed Adjudication of California's Claim To Congress Or The Executive Branch

As set forth in the first *Baker* factor, a political question exists where the Constitution expressly dictates that the decision is committed to the political branches to the exclusion of the federal judiciary. In *Nixon v. United States*, 506 U.S. 224 (1993), for example, the Court held that a federal judge's claim that he had been improperly impeached presented a political question where the constitution conferred on the Senate "sole" authority to "try all Impeachments." *Id.* at 229-231. This case stands in marked contrast to cases such as *Nixon*. As discussed below, there is no "textually demonstrable constitutional commitment" of California's federal common law nuisance claim to a coordinate branch. Rather, the responsibility to adjudicate such claims falls squarely within the federal courts' core powers.

(1) Adjudication Of Tort Claims, Including Interstate Environmental Nuisance Claims, Is Committed To The Federal Judiciary

As *Tennessee Copper* and similar cases establish, adjudication of nuisance claims is well within a federal court's power. That a case may, arguably, have larger implications does not remove it from the courts' traditionally recognized jurisdiction. In *Alperin*, for example, the Ninth Circuit found that the claims of Holocaust survivors against the Vatican Bank for conversion, unjust enrichment, restitution and accounting related to wartime confiscation of property were, at bottom, "garden variety" legal and equitable claims. *Alperin*, 410 F.3d at 548; *see also Klinghoffer v. S.N.C. Achille Lauro, etc.*, 937 F.2d 44, 49 (2d Cir. 1991) (holding that for ordinary tort suits, "the department to whom [the] issue has been 'constitutionally

8. Defendants argue that the second and third *Baker* factors bar this case. (Def. Mem. at 9-11.) Because the factors are related, overlapping, and "more discrete in theory than in practice," *Alperin*, 410 U.S. at 544, California will address all six.

committed' is none other than . . . the Judiciary"). This case, similarly, presents a "garden variety" interstate nuisance claim, notwithstanding its technical and scientific complexity or the scope of the environmental problem.

(2) Nothing In The Case Would Require The Court To Inject Itself Into Foreign Affairs

As in *Alperin*, this Court is "not faced with analyzing a specific clause in the Constitution" that commits the question to another branch, "but rather proceed[s] from the understanding that the management of foreign affairs predominantly falls within the sphere of the political branches and the courts consistently defer to those branches." *Alperin*, 410 F.3d at 549. Both the Supreme Court and the Ninth Circuit have "cautioned against 'sweeping statements' that imply all questions involving foreign relations are political ones." *Id.* at 544-45 (citing *Baker*, 369 U.S. at 211). Not every case that "touches" on foreign affairs raises a political question. *Id.* at 537 (quoting *Baker*, 369 U.S. at 211); *see also Klinghoffer*, 937 F.2d at 49 (holding tort suit against the Palestine Liberation Organization justiciable despite serious and complex international implications).

The Court in *Alperin*, in applying the first *Baker* factor, found it important that the plaintiffs' property claims against the Vatican Bank were not the subject of any treaty or executive agreement. *Alperin*, 410 F.3d at 550. The Ninth Circuit noted further that the plaintiffs' claims did not require, for example, court proceedings against expelled diplomats, determinations about whether another country was an enemy of the United States, or questioning the recognition of a foreign government. *Id.* In the Court's words, the claims "ultimately boil down to whether the Vatican Bank is wrongfully withholding assets. Deciding this sort of controversy is exactly what courts do." *Id.* at 551.

In this case, similarly, no executive agreement or treaty addresses California's global warming nuisance claim. This case does not, of course, involve foreign diplomats, states of war, or recognition of governments. This case seeks redress only for that part of an environmental crisis that has adverse effects in California. While this case, at most, might "touch" on foreign affairs, this attribute does not render the case nonjusticiable.

Defendants cite three cases where courts dismissed claims that had the potential to interfere with foreign policy established by the political branches. (Def. Mem. at 11-12.) All three cases, however, involved state law claims that the Supreme Court dismissed under the Supremacy Clause or the Commerce Clause. *See Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 420 (2003) (striking down under the Supremacy Clause a California state law that compelled European insurance companies to disclose Holocaust-era policy data, where there was a "clear conflict" between state law and an executive branch agreement)*; Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 376 (2000) (striking down under the Supremacy Clause a Massachusetts state law that imposed sanctions against the Burmese government because it would "blunt the consequences of discretionary Presidential action" under a federal sanctions law with the same objective); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 449 (1979) (striking down under the Commerce Clause a California state law that taxed Japanese shipping containers because it would conflict with Congress' power to regulate commerce with foreign nations). Because this case involves a federal law claim, the cases on which defendants rely are inapposite.

California's claim "boils down" to whether defendants have contributed to the interstate nuisance of global warming. *See Alperin*, 410 F.3d at 551. Deciding this sort of controversy is exactly what courts have done since the time of *Tennessee Copper*. In short, California's claim presents an ordinary tort suit that is committed to the judiciary.

b. There Are Judicially Discoverable And Manageable Standards For Resolving California's Federal Common Law Nuisance Claim

The second *Baker* factor, which requires judicially manageable standards, ensures that a court will not be required to "move beyond areas of judicial expertise[.]" *See Goldwater v. Carter*, 444 U.S. 996, 998 (1979) (mem.) (Powell, J., concurring). "The crux of this inquiry is not whether the case is unmanageable in the sense of being . . . difficult to tackle from a logistical standpoint." *Alperin*, 410 F.3d at 552. A claim – even a large, complicated claim – is justiciable where the court has "the legal tools to reach a ruling that is 'principled, rational, and based upon reasoned distinctions.'" *Id.* at 552 (quoting *Vieth*, 541 U.S. 267, 278 (2004)); *see*

also id. at 554 (holding claims justiciable while acknowledging that court faced "behemoth of a case").

Defendants contend that this Court lacks the tools to make two determinations in this case. First, defendants argue, this Court will be unable to determine the level at which emissions become "unreasonable." Second, defendants contend, the Court will not be able to evaluate causation and injury because global warming is scientifically complicated. (Def. Mem. at 10.) As discussed below, defendants' first contention mischaracterizes California's nuisance claim, its second underestimates this Court's ability to handle complex litigation, and both ignore the fact that the legal framework for adjudicating California's claim is well-established.

(1) The Legal Framework For Adjudicating Nuisance Claims Is Well-Established

Courts have been adjudicating interstate environmental public nuisance claims from the beginning of the common law. The elements of a claim based on the federal common law of nuisance are simply that the defendant is carrying on an activity that is causing an injury or threat of injury to some cognizable interest of the plaintiff. *Illinois v. City of Milwaukee*, 599 F.2d 151, 165, (7th Cir. 1979), *vacated on other grounds, Milwaukee II*, 451 U.S. 304 (1981). A public nuisance is "an unreasonable interference with a right common to the general public." *In re Oswego Barge Corp.*, 664 F.2d 327, 332 n.5 (2d Cir. 1981) (quotation omitted); *see also* Restatement (Second) of Torts § 821B(1) (1979).

Whatever "policy" determinations this Court may be called upon to make, they are the types of policy determinations that courts routinely face in ruling on and fashioning remedies for nuisances. As Justice Blackman noted:

> A public nuisance involves unreasonable interference with a right common to the general public. . . . Whether a particular interference qualifies as unreasonable, whether the injury is sufficiently substantial to warrant injunctive relief, and what form that relief should take are questions to be decided on the basis of particular facts and circumstances. The judgments at times are difficult, but they do not require courts to perform functions beyond their traditional capacities or experience.

Milwaukee II, 451 U.S. 304, 348-349 (Blackmun, J., dissenting from holding that federal common law claim for interstate water pollution had been displaced) (internal citations omitted); *see also* Restatement (Second) of Torts § 821B (1979) (describing test for "unreasonable

interference" with a public right as "[w]hether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience").

The Court will not be required to determine whether defendants' actions have been unreasonable, but whether the interference suffered by California is unreasonable. As a leading treatise explains:

> Confusion has resulted from the fact that the intentional interference . . . can be unreasonable even when the defendant's conduct is reasonable. . . . Thus, an industrial enterpriser who properly locates a cement plant or a coal-burning electric generator, who exercises utmost care in the utilization of known scientific techniques for minimizing the harm from the emission of noxious smoke, dust and gas and who is serving society well by engaging in the activity may be required to pay for the inevitable harm caused to neighbors. This is simply a decision that the harm thus intentionally inflicted should be regarded as a cost of doing the kind of business in which the defendant is engaged.

W. Prosser, P. Keeton, et al., Law of Torts 629 (5th ed. 1984).

With respect to causation and injury, federal courts routinely decide nuisance cases of all sorts, including interstate claims involving injury to state interests. Such determinations lie squarely within the expertise of federal courts. As were the property claims in *Alperin*, California's nuisance claim is governed by "well-established case law provid[ing] concrete legal bases for courts to reach a reasoned decision." *Alperin*, 410 F.3d at 553; *see also id.* (noting that the focus of second *Baker* factor is whether courts are "capable of granting relief in a reasoned fashion," not "logistical obstacles" to doing so). The Supreme Court's assessment of the competence of federal courts in *United States v. Munoz-Flores*, 495 U.S. 385, 395 (1990), is apt here: "Surely a judicial system capable of determining when punishment is 'cruel and unusual,' when bail is '[e]xcessive,' when searches are 'unreasonable,' and when Congressional action is 'necessary and proper' for executing an enumerated power" is capable of adjudicating California's claim.

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(2) California Seeks Only Damages In Tort, Not Judicially-Determined Emission Levels

California, through this lawsuit, seeks only damages for harm caused by nuisance. Contrary to defendants' assertion, California is not requesting that this Court establish "reasonable" greenhouse gas emission standards, nor is it seeking any type of injunctive relief. The Ninth Circuit has found this latter distinction important. *Koohi v. United States*, 976 F.2d 1328, 1332 (9th Cir. 1992) (holding tort claim for damages against the United States Navy for shooting down civilian aircraft during military operation justiciable). The *Koohi* Court stated that "[a] key element in our conclusion that the plaintiffs' action is justiciable is the fact that the plaintiffs seek only damages for their injuries. Damage actions are particularly judicially manageable." *Id.* The Court also noted that "because the plaintiffs seek only damages, the granting of relief will not draw the federal courts into conflict with the executive branch. Damage actions are particularly nonintrusive." *Id.* The same is true of this case.

c. California's Claim Will Not Require The Court To Make Initial Policy Determinations Exercising Nonjudicial Discretion

Invoking *Baker*'s third factor, defendants posit that "any meaningful reduction in carbon dioxide emissions can be achieved only if a broad array of domestic and international activities are regulated in coordination" and opine that "[t]his is a policy determination of the highest order that is properly reserved for the political branches of the federal government." (Def. Mem. at 9.)[9/] The Court can adjudicate California's damage claim without making the type of policy decisions defendants suggest.

"A nonjusticiable political question exists when, to resolve a dispute, the court must make a policy judgment of a legislative nature rather than resolving the dispute through legal and factual analysis." *EEOC v. Peabody Western Coal Co.*, 400 F.3d 774, 784 (9th Cir. 2005), *cert. denied*, __ U.S. __, 126 S.Ct. 1164 (2006). Simply applying facts to established law is within the expertise of the judiciary and does not require a court to make a policy choice. *Masayesva v.*

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9. Defendants' argument that this case would require the court to make an "initial" policy determination about matters related to global warming underscores that there is no existing federal policy addressing the matter.

Hale, 118 F.3d 1371, 1378 (9th Cir. 1997); *see also Powell v. McCormack*, 395 U.S. 486, 548 (1969) (holding that senator's claim that he had been unconstitutionally excluded from his seat did not present political question but fell within the "traditional role accorded courts to interpret the law"). Furthermore, an otherwise justiciable claim does not fall outside of the court's jurisdiction simply because an alternative resolution crafted by the political branches arguably would be preferable. *Oneida Indian Nation of New York v. New York*, 691 F.2d 1070, 1083 (2d Cir. 1982) (holding that although legislative solution to the native American land claims may be preferable, the "claims are justiciable notwithstanding the complexity of the issues involved and the magnitude of the relief requested").

California does not seek from this Court – and is not obliged to await – a comprehensive solution to global warming. California alleges that defendants, the six largest domestic emitters of carbon dioxide in the transportation sector in the United States, are contributing to an interstate nuisance and causing concrete injuries to California which are compensable in damages. Consideration and resolution of this case requires only that the Court apply traditional legal tools. It does not require any prior nonjudicial, discretionary policy determination related to the national or international economy, or the development of specific control measures for emissions of greenhouse gases. Contrary to defendants' assertions, the Court will not need to decide whether controlling emissions from vehicles or any other source is good or bad policy, the levels at which emissions should be set, how quickly emissions should be reduced, or any other question requiring the exercise of "nonjudicial discretion." Therefore, the third *Baker* factor does not apply.

d. Resolution Of California's Claim Will Not Result In A Lack Of Respect For The Coordinate Branches Of Government

The fourth prong of the *Baker* analysis applies where it is "impossible" for the court to resolve the claim "without expressing a lack of respect for the political branches." *Alperin*, 410 F.3d at 555; *see United States v. Stahl*, 792 F.2d 1438, 1440 (9th Cir. 1986) (holding that judicial review of ratification of Sixteenth Amendment would have required decision about whether Secretary of State's certification was fraudulent, showing lack of respect to coordinate branch).

Here, judicial action on California's nuisance claims will not call into question a decision by the legislative or executive branches. Moreover, allowing California's nuisance claim to proceed would in no way "shut out" the political branches from participating in this case as it develops, should they choose to do so. *See Alperin*, 410 F.3d at 557 (noting that Court would "respect the political branches' right to weigh in and play a role in the resolution of the Holocaust Survivors' claims"). Accordingly, nothing in the case would show a lack of respect for the legislative or executive branches.

e. There Is No Unusual Need For Unquestioning Adherence To A Political Decision Because No Decision Addressing Global Warming Has Been Made

The fifth *Baker* factor controls where there is an unusual need for unquestioning adherence to a political decision already made. As was the case with the justiciable property claims in *Alperin*, this case is before this Court "not because [the plaintiffs] disagree with a political decision made regarding their claims, but rather because there has been no decision." *See Alperin*, 410 F.3d at 557.

Currently, the federal government has no restrictions of any kind on emissions of carbon dioxide or other greenhouse gases under any treaty, executive order, statute, or administrative standard. At most, the political branches have elected to study the problem, to gather evidence, to develop a policy some time in the future, and to wait for other countries to take action to reduce their greenhouse gas emissions. Certainly, no decisions at the federal level suggest that states cannot sue or take other action related to global warming. There simply is no existing global warming policy nor relevant pronouncements about global warming with which California's nuisance case could interfere.

(1) California's Claim Will Not Conflict With Any Actions Taken by Congress

Defendants cite miscellaneous Congressional Acts authorizing scientific research into global warming for the proposition that "competing policy considerations . . . inhere in this topic." (Def. Mem. at 7, 11-12.) On examination, none of these Acts conflicts with the judicial determination California seeks here. As defendants acknowledge, the National Climate Program

Act of 1978 directed research and data collection; the Energy Security Act of 1980 ordered a study; the Global Climate Protection Act of 1987 directed U.S. EPA to develop a policy for submission to Congress (which has not yet been done); the 1990 Global Change Research Act established a 10-year research program; and the 1992 Energy Policy Act directed the Secretary of Energy to conduct still more assessments related to greenhouse gases. (*See* Def. Mem. at 7-8.) And while the Senate ratified the United Nations Framework Convention on Climate Change in 1992, the Senate took *no action* on the resulting Kyoto Protocol, a framework that would have effected mandatory reductions of greenhouse emissions in developed nations, including the United States. In fact, one of the statutes defendants cite, the 1990 Global Change Research Act, may be read to encourage this federal common law nuisance action. "Nothing in this subchapter shall be construed, interpreted, or applied to preclude or delay the planning or implementation of any Federal action designed, in whole or in part, to address the threats of stratospheric ozone depletion or global climate change." 15 U.S.C. § 2938(c). Moreover, the Global Climate Protection Act, another statute cited by defendants, establishes a general U.S. policy in favor of limiting greenhouse gas emissions. *See* 15 U.S.C. § 2901, note.

The set of Congressional Acts cited by defendants constitutes a vacuum with respect to control of greenhouse gas emissions, and therefore, there is no danger that allowing California's nuisance case to proceed would interfere with decisions already made by Congress or conflict with any Congressional pronouncements.

(2) California's Claim Will Not Interfere With Foreign Policy Related To Global Warming

Defendants describe what they call a "well-established policy" to refrain from any commitment to reduce greenhouse gas emissions domestically unless developing nations make a similar commitment. (Def. Mem. at 9, 12.) In support, defendants cite to a letter from President Bush stating his opposition to the Kyoto Protocol because it exempts developing nations. (Def. Mem. at 9.) In addition, defendants cite U.S. EPA's "denial of petition for rulemaking," which is currently the subject of Supreme Court review in *Massachusetts v. EPA*, No. 05-1120 (U.S. Supreme Court, 2006). The agency in its denial concluded that the Clean Air Act does not

authorize regulation to address global climate change and, in addition, took a foray into foreign policy, stating that "[u]nilateral EPA regulation of motor vehicle [greenhouse gas] emissions could also weaken U.S. efforts to persuade key developing countries to reduce the GHG intensity of their economies." Control of Emissions, 68 Fed. Reg. at 52,924, 52,931, 52,926.

This does not constitute evidence of a "well-established" executive policy that would implicate the fifth *Baker* factor. The President's statement does not announce a global warming policy at all, but rather is his opinion that the Kyoto Protocol should have been more comprehensive. And U.S. EPA's statement, even if the Court were inclined to give it some weight, cannot convert a short list of instances where the federal government has declined to take action to curb greenhouse gas emissions, or deferred action, into a global warming policy that would prohibit any action within the United States until there is action by developing countries. *See Sarei v. Rio Tinto, PLC*, 456 F.3d 1069, 1081 (9th Cir. 2006) (holding tort claim against foreign mining company justiciable even after giving weight to State Department's formal, filed opinion that suit would interfere with foreign affairs). The so-called "policy" cited by defendants has even less substance than the political branches' "stated intent to resolve claims arising out of World War II by way of inter-governmental negotiations and diplomacy" – which the Ninth Circuit found did not defeat the justiciability of Holocaust survivors' property claims. *Alperin*, 410 F.3d at 558. As in *Alperin*, "[n]o ongoing government negotiations, agreements, or settlements are on the horizon." *Id.* Therefore, California's lawsuit, which addresses only domestic greenhouse gas emissions and seeks only damages, does not undermine any federal policy.

f. There Is No Potentiality Of Embarrassment From Multifarious Pronouncements

Turning to the final *Baker* factor, addressing the risk of multifarious pronouncements, the political branches have expressly rejected a need to speak with one voice on the issue of global warming. For example, in his testimony before Congress, the Chairman of the White House Council on Environmental Quality identified as a positive development that "[m]any of our states and cities are experimenting with . . . portfolios of voluntary measures, incentives, and

locally relevant mandatory measures." Testimony of James L. Connaughton before the U.S. House of Representatives Committee on Government Reform (July 20, 2006) at 4.[10/] And in his statement to the United Nations Framework Convention on Climate Change, the Head of the U.S. Delegation, Dr. Harlan Watson, stated:

> I would like to highlight the efforts being made by State and local governments in the United States to address climate change. Geographically, the United States encompasses vast and diverse climatic zones representative of all major regions of the world – polar, temperate, semi-tropical, and tropical – with different heating, cooling, and transportation needs and different energy endowments. Such diversity allows our State and local governments to act as laboratories where new and creative ideas and methods can be applied and shared with others and inform federal policy – a truly bottom-up approach to addressing climate change.

Statement of Dr. Harlan Watson, Senior Climate Negotiator and Special Representative and Head of U.S. Delegation, Ninth Session of the Conference of the Parties, U.N. Framework Convention on Climate Change (Dec. 4, 2003).[11/] This case thus presents no risk of multifarious pronouncements.

3. This Case Will Not Require The Court to Do More Than Interpret The Law

In sum, despite defendants' "cataclysmic and speculative projections about the sweep" of California's common law nuisance claim, this case "boils down to letting the common law [] claim[] proceed to the next stage[.]" *See Alperin*, 410 F.3d at 539 (allowing claims to proceed). To do so, this Court need do no more than "stick to [its] role of interpreting the law." *See id.* This case is justiciable.

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10. http://www.whitehouse.gov/ceq/JLC2006_07_20_House_Govt_Reform_Final_WAc_2.pdf

11. http://www.state.gov/g/oes/rls/rm/2003/26894.htm

II. DEFENDANTS' ARGUMENTS RELATED TO CALIFORNIA'S ALTERNATIVE STATE LAW CLAIM ARE WITHOUT MERIT

A. If This Court Were To Hold That There Is No Cognizable, Justiciable Federal Common Law Public Nuisance Claim, This Case Should Be Dismissed Without Reaching Issues Of State Law

California has pleaded a federal common law claim for public nuisance and, in the alternative, a state law claim for public nuisance. These federal and state claims cannot, however, coexist.[12/] If a federal common law claim for interstate public nuisance is cognizable and justiciable, then there is no state law claim. *See Milwaukee II*, 451 U.S. at 314 n.7; *Ouellette*, 479 U.S. at 487-488. If, on the other hand, this Court were to grant defendants' motion to dismiss California's federal common law nuisance claim for lack of subject matter jurisdiction, there would be no jurisdictional basis for the Court to rule on any other issue in this case. On this point, then, California agrees with defendants: "in the absence of any substantial federal claim, there is no jurisdictional predicate for this case to be heard in federal court." (Def. Mem. at 13 (citing *Opera Plaza Residential Parcel Homeowners Ass'n v. Hoang*, 376 F.3d 831 (9th Cir. 2004); *see also* Defs. Mem. at 19 n.9 (citing *Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 421 (9th Cir. 1991)). Accordingly, if the Court holds that there is no federal common law claim, it should dismiss the state law claim without prejudice without reaching any other issue.

B. California Has Stated A Valid Claim Against Defendants Under State Law

As stated, the Court should dismiss this case if it holds there is no federal nuisance claim. Accordingly, while California notes its strong disagreement with defendants' rendition of state law, California responds to defendants' state law arguments only briefly.

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12. California pled in the alternative to avoid a contention, should the federal cause of action be dismissed, that it had engaged in claim splitting. California did not allege a violation of state public nuisance law in this federal action because it believed that a federal court has jurisdiction to rule upon a state law-based nuisance claim where there is no other federal claim and no diversity.

1. California Civil Code Section 3482 In No Way Bars the Action Because No Statute Expressly Authorizes Defendants' Emissions of Greenhouse Gases

California Civil Code section 3482 provides that "[n]othing which is done or maintained under the *express authority* of a statute can be deemed a nuisance." (Emphasis added.) Defendants contend that because California regulates auto emissions through the California Clean Air Act and California has sanctioned the sale of autos, California has in effect expressly authorized any nuisance caused by automobiles, and, therefore, California Civil Code section 3482 precludes a state law-based nuisance action.

As interpreted by the California courts, section 3482 bars a state nuisance action only where "the acts complained of are authorized by the express terms of the statute under which the justification is made, or by the plainest and most necessary implication from the powers expressly conferred, so that it can be fairly stated that the Legislature contemplated the doing of the very act which occasions the injury." *Varjabedian v. City of Madera*, 20 Cal. 3d 285, 291 (1977) (quotation omitted). As the California Supreme Court held, the requirement of "'express authorization' . . . insures that an unequivocal legislative intent to sanction a nuisance will be effectuated, while avoiding the uncertainty that would result were every generally worded statute a source of undetermined immunity from nuisance liability." *Id.*

A defendant cannot obtain the protection of section 3482 simply because the defendant's activity is in compliance with the law. *Venuto v. Owens-Corning Fiberglas Corp.*, 22 Cal. App. 3d 116, 129 (1971) (holding that compliance with regulations of local air district did not protect against nuisance claim); *see also Ileto v. Glock*, 349 F.3d 1191, 1214 (9th Cir. 2003) (holding that legality and regulation of occupation did not protect against public nuisance claim). Defendants' reliance on *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863, 888 (9th Cir. 2001) is misplaced. In that case, the Ninth Circuit, exercising supplemental jurisdiction and interpreting California law, found that defendant's permit explicitly authorized defendant to discharge storm water containing pollutants, including the pollutant that was alleged by plaintiff to be a nuisance. The Ninth Circuit held that because the permit expressly authorized the discharge of the pollutant, and there was no evidence that the pollutant was discharged before the permit was in

place, there could be no state claim for nuisance related to the discharge. *Id.* at 888. In this case, in contrast, there is no permit, statute, or regulation of any kind that expressly permits automobiles to emit carbon dioxide, or establishes a permissible level of such emissions. Accordingly, the safe harbor rule of *Carson Harbor*, and the protections of California Civil Code section 3482, are inapplicable.

2. California's So-Called "Enthusiastic Consent" To The Sale Of Motor Vehicles Does Not Preclude A Public Nuisance Action

California has participated in creating the infrastructure for use of autos in the state. As defendants note, California purchases and uses vehicles in its governmental capacity and derives tax revenue from auto sales. Defendants cite to a 1872 Maxim of Jurisprudence,[13/] contending that California by these acts has consented to the impacts of global warming and greenhouse gas emissions. Consent is a defense to a nuisance claim, however, only where the plaintiff expressly consents to the particular activity and to the particular resulting nuisance or hazard. *See Magnini v. Aerojet-General Corp.*, 230 Cal. App. 3d 1125, 1140 (1991) (holding that lessee's defense of consent to lessors' hazardous waste nuisance claim not established merely because lease stated that lessors "covenant that they will acquiesce in any nuisance or hazard caused by Lessee").

Under defendants' formulation, any time California supports, through infrastructure or other actions, a product in the marketplace, it is precluded from seeking recovery for any harm that product may ultimately cause. That is not the law. Simply stated, California supports the purchase and use of motor vehicles; it has not thereby expressly consented to defendants' greenhouse gas emissions that cause substantial harm to the State.

3. Defendants Manufacture And Sell Products That Result In Significant Contributions To Global Warming And Damage In California, Giving Rise To A Public Nuisance Claim

Defendants, relying on *County of Santa Clara v. Atlantic Richfield Co.*,137 Cal. App. 4th 292 (2006), argue that the "mere sale and distribution" of a product does not give rise to public nuisance liability. (Def. Mem. at 25.) In *Santa Clara*, defendant lead paint manufacturers argued that only a product liability cause of action can apply where the cause of the nuisance

13. "He who consents to an act is not wronged by it." Cal. Civ. Code § 3515.

alleged is a product. The court rejected that contention, finding that public nuisance can apply to products. *Id.* at 305-06. "[T]he critical question is whether the defendant *created or assisted in the creation of the nuisance*.'" *Id.* at 306 (quoting *City of Modesto Redevelopment Agency v. Superior Court*, 119 Cal. App. 4th 28, 38 (2004), emphasis in original); *see also City of Modesto Redevelopment Agency*, 119 Cal. App. 4th at 41-42 (holding that manufacturer of waste discharge equipment could be held to answer in nuisance). Here, California alleges that defendants manufacture motor vehicles designed to discharge greenhouse gases in a manner that creates a nuisance and that defendants knew or should have known of the emissions and their impacts. (Compl. at 13, ¶ 61.) As such, the complaint squarely alleges a public nuisance under California law.

4. California May Seek Damages As A Remedy For Public Nuisance Under California Law

Defendants, citing *Santa Clara*, argue that under state law, California may not seek damages as a remedy for public nuisance in a case where the nuisance results from a product. Their reliance on *Santa Clara*, where the plaintiff was a county, is misplaced. Under California nuisance law, "[w]here the State has a property interest which has been injuriously affected by a nuisance, the State can, like any property owner, seek damages." *Selma Pressure Treating Co., Inc. v. Osmose Wood Preserving Co. of Am., Inc.*, 221 Cal. App. 3d 1601, 1614 (1990). Here, if it must resort to state law, California will seek damages related to its usufructuary interests in natural resources, its legal interests for the benefit of the People, and its *parens patriae* interest in the air, land and water, *see Selma Pressuring Treating*, 221 Cal. App. 3d at 1617-1618, interests which are uniquely the State's. Therefore, the *Selma Pressure Treating* decision rather than *Santa Clara* applies, and California may recover damages under a state public nuisance claim.

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5. Federal Law Recognizes Rather Than Preempts California's State Public Nuisance Cause Of Action

Finally, defendants contend that both the Clean Air Act and EPCA preempt California's state public nuisance claim.[14/] A preemption analysis begins with "the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 432-33 (2002) (quotation omitted). The party claiming preemption bears the burden of demonstrating that federal law preempts state law. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984). Defendants cannot meet their burden.

a. The Clean Air Act Explicitly Exempts, Rather Than Preempts, California's State Law Action

The Court must reject defendants' preemption argument. Defendants cite *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992) for the proposition that common law damages claims are "standards" and therefore preempted. (Def. Mem. at 30.) First, defendants fail to note that the *Cipollone* holding they cite is in the plurality portion of the opinion. Second, and more importantly, the preemption language construed by the plurality preempted "requirement[s] or prohibition[s] . . . imposed under State law," and contained no savings clause similar to section 104(e) of the Clean Air Act (42 U.S.C. § 7604(e)). *Id.* at 520. In addition, in the portion of the case constituting the Court's holding, the Court ruled that "there is no general, inherent conflict between federal pre-emption of state warning requirements and the continued vitality of state common-law damages actions." *Id.* at 518.

Clean Air Act section 209(a) (42 U.S.C. § 7543(a)) does not have the broad preemption language at issue in *Cipollone*. Rather, it preempts the adoption by a state of "any standard

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14. Defendants in *Central Valley Chrysler Jeep v. Witherspoon*, CV F 04-6663 (E.D. Cal.) argue that carbon dioxide is not a "pollutant" as defined by the Clean Air Act. Their argument in this case that a preemption provision that applies only to "pollutants" should apply to bar a state law nuisance claim related to carbon dioxide is inconsistent. Arguably, defendants should be estopped from making these irreconcilable arguments. But, since the Clean Air Act exempts rather than preempts any state law nuisance claim, California will address defendants' preemption argument on its merits.

relating to the control of emissions" of pollutants from new vehicles, 42 U.S.C. § 7543(a), and section 104(e) preserves "any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief." 42 U.S.C. § 7604(e). Thus, other relief, including common law remedies that do not constitute standards relating to the control of emissions for new vehicles, are not preempted. While, arguably, common law injunctive remedies could result in "standards," *see Ouellette*, 479 U.S. at 493-94, damages do not constitute "standards," and are therefore exempted under the Act. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 63-64 (2002) (holding that savings clause similar to Clean Air Act section 104(e) preserves common law damages remedies to ensure compensation for accident victims); *see also Bates v. Dow Agrosciences, LLC*, 544 U.S. 431, 445 (2005) (holding that a jury verdict under a state tort law is not a "requirement" under express preemption provision that applies to "any requirements").

Defendants also argue that California's state law damages action is not expressly preempted, it is subject to conflict preemption, citing *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 973 (2000). (Def. Mem. at 31.) Defendants' conflict preemption argument repeats the express preemption argument and fails for the same reasons. If California must resort to a state forum, its state public nuisance action is authorized by and consistent with the Clean Air Act.

b. California's Alternative State Law Claim For Damages Is Not Preempted By EPCA Because It Is Not Related To A Fuel Economy Standard

Defendants also contend that EPCA preempts California's state common law action because, they argue, a state greenhouse gas emission standard is really a fuel economy standard in disguise. EPCA's preemption provision reads: "a State . . . may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards[.]" 49 U.S.C. § 32919(a). This provision is almost identical to the preemption language in *Sprietsma*, which the Supreme Court read as not encompassing common-law claims for two reasons:

> First, the article "a" before "law or regulation" implies a discreteness – which is embodied in statutes and regulations – that is not present in the common law. Second, because a work is known by the company it keeps, the terms "law" and "regulation" used together in the pre-emption clause indicate that Congress pre-empted only positive enactments. If "law" were read broadly so as to include the common law, it might also be interpreted to include

> regulations, which would render the express reference to "regulation" in the pre-emption clause superfluous.

537 U.S. at 63 (internal quotation and citation omitted). The same result holds in this case.

Additionally, defendants base their EPCA preemption claim on the notion that California's state public nuisance action for damages creates a "standard." This damage action does not constitute a standard. Further, as noted above in section I.B.2.b., EPCA is not aimed at pollution or emissions at all. There is simply no evidence that Congress intended EPCA to preempt a state action directed at the impacts of emissions.[15/]

CONCLUSION

Under longstanding Supreme Court jurisprudence, a state's claim for redress of interstate pollution arises under federal common law. No federal statute provides an all-encompassing, comprehensive Clean Water Act-like scheme for addressing greenhouse gas emissions or global warming, or provides a remedy for the same, and, as a result, no federal statute displaces federal common law. While the issue of global warming broadly touches on foreign policy, California's claim concerns domestic actors, domestic actions, and domestic impacts, and is well within the Court's tort expertise. The case meets none of the *Baker* criteria for a political question, and is therefore justiciable.

California alleges significant harms to the State resulting from defendants' substantial contributions to global warming. As such, California presents a case squarely within the Court's

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15. Defendants cite to a statement by the National Highway Traffic Safety Administration ("NHTSA"), found in the preamble to the Light Truck Standard, in which NHTSA sets forth its view that state standards for carbon dioxide emissions are preempted by EPCA. Defendants contend that NHTSA's view should be granted deference. (Def. Mem. at 33.) Because NHTSA's view is only relevant if the state law damages action creates a standard, we simply note that NHTSA's view and the deference it may or may not be owed is currently contested in both *Central Valley Chrysler Jeep v. Witherspoon*, CV F 04-6663 (E.D. Cal.), and *People of the State of California, et al. v. NHTSA*, 06-72317 and 06-72641 (9th Cir.) (multi-state challenge to NHTSA light truck standards and its preamble preemption statements). Suffice it to say, California strongly disputes NHTSA's view and believes deference is not appropriate.

purview. We return to Justice Holmes in *Tennessee Copper*:

> It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains, be they better or worse, and whatever domestic destruction they have suffered, should not be further destroyed or threatened by the acts of persons beyond its control, that the crops and orchards on its hills should not be endangered from the same source.

206 U.S. at 238. Like Georgia in 1907, California in 2007 must be afforded a federal forum to present its interstate nuisance claims.

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